In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 566

CELIA HOOPER, PETITIONER

v.

UNITED STATES OF AMERICA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The court of appeals correctly held that the challenged order in this case, overruling petitioner's objections to a declaration of taking based upon allegations that the government chose an inappropriate location for an electrical substation, was not a final decision appealable under 28 U.S.C. 1291. The case is on all fours with *Catlin* v. *United States,* 324 U.S. 229. As in *Catlin,* a declaration of taking was filed; an order was entered *ex parte* putting the government in possession of the property;[1] pleadings were

[1] No appeal was taken from the order of possession and the substation has been built and is in operation.

797-241—65

filed by petitioner stating her objections to the taking; and the district court entered the challenged order overruling those objections. As in *Catlin,* the issue of compensation has not yet been determined. *Catlin* holds that an order overruling petitioner's objections to the taking in these circumstances is not a final decision (324 U.S. at 233):

> * * * [O]rdinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property.

None of the grounds upon which petitioner attempts to distinguish *Catlin* is well taken. *Catlin* is not inapplicable to condemnation proceedings under the TVA Act; on the contrary Section 4(i) of the TVA Act (16 U.S.C. 831c(i)) expressly makes applicable the Declaration of Taking Act (40 U.S.C. § 258a–e) under which *Catlin* arose.[2] Nor does Rule 71A of the Federal Rules of Civil Procedure, specifying the procedures governing condemnation cases in the district courts, affect the question of appealability or supersede the *Catlin* decision. Finally, while the post-*Catlin* decisions of this Court cited in the petition (*Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541; *Gillespie v. United States Steel Corp.,* 379 U.S. 148; *Brown Shoe Co.*

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[2] Section 4(i) provides:

> * * * nothing contained herein or elsewhere in this chapter shall be construed to deprive the Corporation of the rights conferred by sections 258a–258e of Title 40 [the Declaration of Taking Act].

v. *United States,* 370 U.S. 294) find particular classes of decisions in other types of cases sufficiently severable from the remaining litigation to constitute "final" decisions, they do not in any way question the continuing validity of the settled *Catlin* rule as to decisions overruling preliminary objections in condemnation proceedings.

Respectfully submitted.

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DECEMBER 1965.

END